Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GARY R. CLARK,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

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BRIEF IN OPPOSITION

JOHN F. KAY, JR.
Counsel of Record
RUSSELL V. PALMORE, JR.
SUSAN C. ARMSTRONG
LINDA J. THOMASON
MAYS & VALENTINE
Post Office Box 1122
Richmond, Virginia 23208
(804) 697-1200
Counsel for Respondent The Chesapeake and Ohio Railway Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether in a case arising under the Federal Employers' Liability Act evidence of damage caused by a flood and the railroad's subsequent efforts to repair such damage was properly admitted by the trial court when liability for an employee's injuries depends on whether the railroad exercised reasonable care under the circumstances.

2. Whether in a case arising under the Federal Employers' Liability Act the trial court erred in refusing to instruct the jury that petitioner was not contributorily negligent after making such a ruling in chambers.

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On Petition for Writ of Certiorari to the Supreme Court of Virginia

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BRIEF IN OPPOSITION

Respondent The Chesapeake and Ohio Railway Company (the "C & O"), respectfully submits this brief in opposition to the petition for a writ of certiorari to review the decision of the Supreme Court of Virginia. For the reasons set forth below, the petition should be denied.

STATEMENT OF THE CASE

Petitioner's statement of the case is generally satisfactory. However, the C & O will correct one inaccurate statement and will elaborate upon the circumstances that prevailed after the flood.

In the first paragraph of petitioner's statement of the case, he states that during trial he objected to the introduction of evidence regarding a flood, "which occurred

on November 4, 1984 . . . since the injury to Clark did not occur until January 14, 1986 and was not relevant to the case." Petition at 6. The flood referred to by petitioner occurred on November 4, 1985, slightly more than two months before petitioner's alleged injury rather than fourteen months, as petitioner's statement implies. Petitioner again incorrectly identifies the date of the flood in the argument portion of his petition. *See* Petition at 18. The other references in the petition to the date of the flood are correct. *See* Petition at 1, 14.

Petitioner's discussion of the video introduced into evidence and of the flood damage at the site of his alleged injury requires amplification. One hundred nine miles of track bounded by Clifton Forge, Virginia, on the west and Gladstone, Virginia, on the east is known as the James River Subdivision. As its name implies, the subdivision follows the course of the James River and when the river flooded on November 4, 1985, track throughout the entire subdivision was submerged. Some areas of track were totally destroyed and had to be completely rebuilt. Other areas suffered minor damage and only required minimal clean-up efforts. Approximately ninety percent of the power switches—those designed to be operated electrically—had been submerged and had to be flushed out before they could be operated even manually. Appendix ("App.") at 2a-7a.

Petitioner's alleged accident occurred when he attempted to throw manually the Tyree power switch, which is within the city limits of Lynchburg. App. at 8a. Lynchburg and the area east of Lynchburg was heavily damaged by the flood. App. at 2a-6a. At the Tyree switch though, the damage was very minor. App. at 7a.

A video taken by a local television station was introduced into evidence over petitioner's objection. It showed the flood's damage to track in Lynchburg and other areas of the subdivision. Neil Frost, the C & O roadmaster for

the James River Subdivision, testified that the video was representative of the damage throughout the subdivision, though some areas were hit harder than those depicted in the video. App. at 3a-4a. Frost described the damage caused by the flood and the mammoth restoration effort that was undertaken to put the subdivision back in operation. Frost testified that the subdivision did not approach pre-flood operating capacity until mid to late March, 1986. App. at 5a. Robert Smith, the C & O Signal Supervisor, testified that the Tyree switch could not be operated electrically until February 19, 1986. App. at 9a.

REASONS FOR DENYING THE WRIT

I. The Petition Presents No Important Question Warranting This Court's Review.

This case does not merit review by the Supreme Court of the United States. The petition presents no important or novel question; nor does it demonstrate any conflict with opinions of this Court or with the decision of another state court of last resort. Rather, the questions presented involve purely discretionary rulings that the Supreme Court of Virginia has already been found to be free of reversible error. *See* Petitioner's Appendix ("Pet. App.") at xlvii-xlviii.

Petitioner has failed to provide this Court with any compelling reason for granting his petition for certiorari. Instead, petitioner merely asserts that the courts below "did not follow the law of the Federal Employers' Liability Act and its interpretation by the Supreme Court of the United States and by other Federal Courts and State Courts." Petition at 18. Petitioner, however, does not cite a single case dealing with the questions presented for review: the admissibility of evidence or the propriety of jury instructions in a case arising under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq* ("FELA").

Petitioner's failure to set forth any special or important reason for this Court to exercise its extraordinary discretionary review powers is sufficient grounds for denial of the petition. *See* S.Ct. R. 17.1.

Moreover, the challenged rulings of the trial court relate to matters that were fact-specific and within the discretion of the trial court. Such rulings are entitled to great weight and are wholly inappropriate for review by certiorari. This Court has so ruled: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

In FELA cases, rulings on admissibility of evidence are left to the sound discretion of the trial judge and will not be disturbed absent abuse of that discretion. *Lavender v. Kurn*, 327 U.S. 645, 654 (1946). Review by this Court of the first question presented would require a painstaking evaluation of the disputed evidence in light of all the evidence to determine whether its probative value outweighed the disadvantages, if any, arising from its admission. *See Levine v. Lynchburg*, 156 Va. 1007, 1014, 159 S.E. 95, 98 (1931).[1] Likewise, to review the trial court's refusal of petitioner's contributory negligence instruction, this Court necessarily would be required to examine the jury instructions as a whole in the context of all the evidence and arguments presented to determine if the law of the case was fairly submitted to the jury. *See Kirby v. Moehlman*, 182 Va. 876, 886 30 S.E.2d 548, 551 (1944) (quoting *Higgins v. Whitemore*, 116 Va. 414, 423, 825 S.E. 180, 183 (1914)); cf. *Smith v. Chesapeake & O.R. Co.*, 778 F.2d 384, 388-89 (7th Cir. 1985).

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[1] This Court has recognized that questions regarding admissibility of evidence in FELA cases adjudicated in state court constitute matters of practice and procedure to be governed by State rules. *Chesapeake & O.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916); *see also* Annot., 79 A.L.R.2d 553, 583 (1961).

In denying petitioner's petition for appeal and subsequent petition for rehearing, the Supreme Court of Virginia necessarily recognized that no reversible error existed requiring the exercise of its discretionary jurisdiction to review the trial court's rulings. In effect, petitioner now asks this Court to afford him yet another review of fact-specific matters already resolved in favor of the C & O—twice by the trial court and twice by the Supreme Court of Virginia. Because the petition raises no issue of overall importance, further review by this Court is not warranted and the petition should be denied.

II. The Trial Court Correctly Admitted Evidence of Flood Damage.

Petitioner alleges that he suffered soft tissue injuries to his back while manually throwing a switch that was designed to be operated electrically except in emergencies or unusual circumstances. It was undisputed that electrical switches, when operated manually, are more difficult to throw than manual switches. The switch involved was submerged during the November 4, 1985 flood and, like all switches affected by the flood, had to be operated manually while repairs to restore electrical service were made.

Petitioner argues that the trial court should have excluded evidence regarding the massive flood that extensively damaged railroad property. This argument simply takes issue with the trial court's discretionary ruling that the evidence was relevant; it does not justify issuance of a writ of certiorari. In any event, the trial court's ruling was correct.

In this FELA action, the question is whether the railroad exercised reasonable care under the circumstances as they existed at the time of injury. *See Delaware, L. & W.R. Co. v. Koske*, 279 U.S. 7 (1929); *Missouri P.R. Co. v. Aeby*, 275 U.S. 426 —— (1928); *see also McGivern v Northern P.R. Co.*, 132 F.2d 213 (8th Cir.

1942). In making that determination, the fact finder must consider evidence of the particular circumstances involved. In the present case, evidence of damage caused by a devastating flood which occurred little more than two months before the accident, crippling miles of track and requiring months of work to restore service to the system, is clearly relevant. The switch that allegedly caused petitioner's injury was one of the flood's minor casualties and petitioner, as well as other railroad employees, had to operate it, and all other switches on the subdivision, manually rather than electrically on the day petitioner was injured and for weeks thereafter. The C & O was entitled to show the jury the extent of the flood damage and of its restoration efforts so that the jury could decide whether the C & O had exercised reasonable care under the circumstances.

Moreover, as petitioner correctly observes, courts take great pains not to intrude upon the role of a jury in determining questions of negligence in FELA cases. *See Rogers v. Missouri P.R. Co.*, 352 U.S. 500 (1937). This is precisely what the trial court did in permitting the jury to hear and evaluate the relevant evidence of flood damage in determining whether the C & O was negligent. Like the Supreme Court of Virginia, this Court should decline to review this discretionary ruling of the trial court.

III. The Trial Court Correctly Refused to Instruct the Jury That the Petitioner Was Not Negligent as a Matter of Law.

Upon ruling that the C & O had not presented sufficient evidence of petitioner's contributory negligence, the trial court refused the C & O's proposed jury instruction on that issue. *See* Pet. App. at xxviii-xxx. It also refused to instruct the jury that petitioner was free of negligence. Pet. App. at xxx. Refusal of petitioner's proposed instruction was correct for one of two reasons.

First, if the trial court was correct in striking the C & O's contributory negligence defense, then petitioner's negligence, or lack thereof, was no longer an issue and the refusal to instruct the jury on such a non-issue was proper. Conversely, if, as the C & O contends, the trial court erroneously struck the C & O's contributory negligence defense, then the instruction petitioner requested was likewise unwarranted, and the contributory negligence issue should have been submitted to the jury.

Assuming arguendo that the trial court should have given petitioner's contributory negligence instruction, its refusal to do so was harmless. As this Court has stated, and as the jury was instructed, liability under the FELA depends on whether "employer negligence played any part, even the slightest, in producing the injury or death from which damages are sought." *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 506 (1957). Under the FELA, contributory negligence only affects the amount of damages awarded, if any, and has no effect upon liability issues. *See* 45 U.S.C. § 53. The jury's verdict for the C & O necessarily established that it found no evidence of C & O negligence and, therefore, no C & O liability. Accordingly, the jury never reached the issue of damages or the question of reducing the damages awarded to petitioner due to his contributory negligence. Thus, the trial court's refusal to instruct the jury that petitioner was free from negligence could not have prejudiced petitioner. *See Feigl v. Terminal R. Asso.*, 30 Ill. App. 3d 55, 332 N.E.2d 416 (1975).

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

JOHN F. KAY, JR.
Counsel of Record
RUSSELL V. PALMORE, JR.
SUSAN C. ARMSTRONG
LINDA J. THOMASON
MAYS & VALENTINE
Post Office Box 1122
Richmond, Virginia 23208
(804) 697-1200
Counsel for Respondent
The Chesapeake and Ohio
Railway Company

APPENDICES

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT
OF THE CITY OF PORTSMOUTH
VIRGINIA

At Law No. L86-415

GARY R. CLARK,

Plaintiff,

vs.

C&O RAILWAY COMPANY,

Defendant.

EXCERPTS FROM
TRANSCRIPT OF PROCEEDINGS

May 15, 1987—10:00 a.m.

Portsmouth, Virginia

TAKEN BEFORE:

The Honorable L. Cleaves Manning,
Judge, and Jury

APPEARANCES:

Moody, Strople & Lawrence
By: Randall E. Appleton, Esquire
and C. Gerard Thompson, Esquire
Counsel for the Plaintiff

Mays & Valentine
By: Susan C. Armstrong, Esquire
and Russell V. Palmore, Jr., Esquire
Counsel for the Defendant

REPORTED BY:

Susan L. Pillow, RPR, CSR, CM

* * * *

NEIL FROST—DIRECT

[170] Q And for what part of the James River subdivision are you roadmaster?

A Well, I'm roadmaster over the whole James River subdivision.

Q And how long is the James River subdivision in terms of trackage?

[171] Neil Frost—Direct

A It goes from mile post 120 to mile post 229.4, which is 109.4 miles.

Q And that would be roughly between what two points on the map?

A Between Gladstone, Virginia and Clifton Forge, Virginia.

* * * *

[176] Q What other conditions do you recall that you personally inspected following the flood?

A Well, on Thursday, I went to Lynchburg to get the line open between downtown Lynchburg, which is about mile post 145, to mile post 120. That was my assigned section. And I had thirty or so people; and in assessing the damage as to what would be the best way to open the line, I—we first—we knew how to go from Lynchburg, east, so we started at that point inspecting, patrolling, walking the track. We took in loaders and tried to push debris off the track.

Q What kind of debris did you find on the track?

A There was huge piles of ties, tie butts, which are little chunks of ties that we—they end up as short pieces when we take them out of the track. There was trees, logs, anything that would float. Anything that would float was on the [172] track. Lumber. There was one area that was, oh, I guess twice the width as long as this room, which that completely covered both main lines,

and it was ten feet high: just jammed full of chlorine bottles, propane, oxygen, saline, lumber, rolls of paper that weighed two, three, four thousand pounds a piece. And all that had to be cleared in order to even get a train by.

Q I take it that it would be fair to say that at least at that point, the track was inoperable?

* * * *

BY MR. PALMORE:

Q You testified that there was some areas that were washed out?

A Yes. That's true.

Q Were there other areas that were [178] less damaged?

A There was a lot of major wash outs. That is, the ballast between the ties was washed away or the level of the river was approximately the height of the rail and it just washed through the track as opposed to washing completely under it. Those had to be taken care of. This was east of Lynchburg, and just east of Lynchburg a mile, there was one location where everything was gone under both main lines. We had to build little temporary bridges out of a railroad ties and take railroad cars over it and dump all this rock and then bring the track up more level than what it was. There was—there was many places east of Lynchburg where the—everything was gone from the end of the ties out: the rails, about two feet out from the rail, from the end of the ties, and went straight down ten, fifteen, twenty feet. There was no walkway at all and we had to fill this portion of the track in to maintain a solid roadbed.

* * * *

[184] Q Now, what you have just shown the jury, described for the jury, is that or was that not indicative of many places along the entire James River subdivision?

A I'd say it was a fair example of many areas along

the subdivision, and there were really a few places worse than that.

Q Now, after you were assigned or after you took over the supervision of the clean-up between Lynchburg and Gladstone, how long did it take to put the railroad back into operation where you could actually have trains moving along the line?

A It took a full ten days from the time of the flood to the time the first train left Clifton Forge and could get to Gladstone, even though they operated very limited speeds. Mostly ten miles an hour.

Q What type of hours did you have the men working along the James River subdivision to [185] put it back into shape?

A I changed the—that is, the men that worked on my end, I changed their starting times such that they would be on the job at daylight. Of course, in the wintertime, it's say 6:30 probably about the time you get daylight, and we worked until dark, which again, due to a loss of daylight during the winter hours, you only work until about 5:30 or 6:00 at night. We didn't work anybody in the dark because we didn't—we didn't think the—with as much work as we had to do, we didn't think trying to work at night and getting say a fourth of the work you could do in the day was worth the risk of, you know, around these wash outs and stuff. We just didn't think the risk was worth the benefits.

Q So a typical day would go from approximately what time to what time?

A Six in the morning until six, seven at night.

Q And you state that it took approximately ten days to actually put the—get the track to the point where you could pass a train over it?

A That's true.

[186] Q And at a limited capacity?

A Yes, sir.

Q Now, did that—once that was accomplished, was the work done in terms of building the railroad back?

A No. That only did the minimum that you could do to the main line to get a train from Clifton Forge to Gladstone. Just the minimum. There was still weeks and hours—many, many hours, manhours to be spent building the roadbed out, resurfacing some tracks, redumping some places that were weak, that were low. Hundreds and hundreds of hours of telephone poles, erecting those, unloading those.

We had things what we call slide fences that were full of debris. Slide fence is a type of fence that sets the signal when a rock falls down and into the fence, it causes the red signals so the trains have to stop. None of those operated so you were really in a blind as to whether there was a rock on the track along these bluffs where you have cliffs along the track. All of that had to be cleaned out, rebuilt. There was so many, many things had to be done.

Side tracks washed completely away. [187] All this had to be rebuilt.

Q If you use the ten-day—approximately ten-day period in which it took to put the track back into at least minimum operation, how long did it take, Mr. Frost, to get the James River subdivision back, if you will, to even approaching the level of pre-flood 1985?

A The middle, end of March 1986. We worked all winter and had to go into roadbed, working on tracks, yard tracks, sidings, lesser used tracks. It took all winter to get these in good shape.

* * * *

[189] Q Now, along the tracks of the James River subdivision, are there what are referred to as power switches?

A Yes, there are.

Q And what is your understanding of what a power switch is?

A A power switch is one that is remotely controlled. That is, the movement of the switch, the changing from switch points to line the train from either number one or two track or into a siding or down the main line, it's controlled from Richmond, which is our central dispatching office.

Q And what effect did the flood have on the power switches?

A Well, the flood, it—most of the switches were covered with water. I'd say almost probably ninety percent of them; and it deposited a lot of mud and debris in and around the switches, particularly inside of them. It knocked down these telephone lines which carries the signal from Richmond, so without any signal, the switches lay dormant, they can't even be used. And of course they were immediately cleaned up, but until the signal lines were put back, they couldn't be in full operation.

[190] Q Okay. I take it in addition to power switches, there were manual throw switches as well or hand throw switches?

A Oh, there is plenty of hand throw switches on the main line and of course most all yard switches are manual.

Q Now, were there some areas along the James River subdivision that required little or no repair?

A There was some areas around on the subdivision that didn't need any repair.

* * * *

[191] Q Are you familiar, Mr. Frost, with a power switch that's located at mile post 143?

A Yes, I am.

Q Is that location referred to as Tyree?

A Yes. Its location is Tyree east end double track, Tyree.

Q Is that a power switch?

A Yes, it is.

Q Now, was that switch to your knowledge knocked out or made inoperable as a result of the flood?

A It was made inoperable electrically because of the flood because of the signal damage, because of the dirt damage inside the machine itself.

* * * *

[193] BY MR. PALMORE:

Q Mr. Frost, what was the general [194] condition of the switch area at Tyree after the flood?

A After the flood, the general condition at Tyree was no apparent damage. Of course, there was certain amount of debris, but over in the ditch lines. There wasn't much—really wasn't any on the track itself. There was some sand and a little bit of debris got stuck in the switch points from the flowing of the water. As far as roadbed damage, that is the ground beyond the end of the ties, there was next to nothing.

Q What maintenance did—strike that.

What maintenance was performed at the switch area, if any then, from the time that the water subsided at the Tyree switch area until late May 1986?

A We hadn't done anything there through May '86.

Q Put any gravel down?

A No. We didn't dump any ballast or gravel.

* * * *

[196] Q Tell the jury, if you will, Mr. Frost, the difference in throwing a power switch as opposed to one that's normally operated [197] on hand throw.

A Well, a power switch, like it says, is—normally should be thrown by power, and when you hand throw a power switch, you're doing something that should only be done in an emergency situation, which is what we had at the time. And in comparison to a regular hand throw switch, they are a little more difficult to throw. And some of the reasons are a typical hand throw switch has switch points that are only sixteen-and-a-half feet long:

two points at sixteen-and-a-half feet long each, whereas this particular power switch—and most of them are—the points are twenty-four or thirty feet long. Almost twice the weight. And so you're pushing twice the weight over and back—with the help of the mechanism, of course, you are pushing twice the weight over and back—as you do on a normal hand throw switch in the yard situation. You know, in the yard where they're more frequently hand thrown, too.

* * * *

[226] Q I believe you testified that you started your work at Lynchburg?

A Yes, sir.

Q And Tyree is how much miles east of Lynchburg?

A Well, it's within the city limits of Lynchburg, but if you consider the yard office which sits at mile post 145 the center of Lynchburg, as far as the railroad is concerned, it's two miles east of Lynchburg.

Q Okay; and you all worked basically west to east?

A My little group did. West to east.

Q And that the Tyree area was within two miles of that?

A Yes, sir. From our beginning point.

* * * *

ROBERT SMITH—DIRECT

[242] Q What function did you and your men play in terms of responding to that damage?

A At first, you have to clean the mud out of these switches. And you learn a little more each flood you go through. If you don't wash them out before the mud dries them, then it's almost an impossibility to clean them up. Then, you have to tear them down, wash them out. We use high pressure water pumps, wash the mud out of them, and put them back together, which the motors in them are ruined. We have to put new motors back in them. They are non-salvageable.

Q I'm going to ask you if you will to direct your attention specifically to the power switch at Tyree, Virginia, mile post 143. Are you familiar with the one I'm talking about?

A Yes, sir.

[243] Q Okay. Was that power switch knocked out as a result of the flood?

A Yes, sir, it was.

Q Now, with respect to putting the switches back on line if you will, will you tell the members of the jury in which direction, from what end of the James River subdivision did you work?

A See, the way they carry the equipment is the way the system is designed, you have to start from west and work east. You can't go to the east and work west or go in the middle, because the way it's engineered, you have to work from west to east, because the electronic equipment that we use comes from Richmond to Clifton Forge, then works back east, and it has to be put back in succession.

Q Based upon your position as supervisor of signals, Mr. Smith, do you know when the power switch at Tyree was placed back on line?

A I believe it was February the 19th.

Q Of 1986?

A Yes, sir.

Q As of February 19, 1986, Mr. Smith, had the—had the result of or the damage that was [244] caused by the flood along the James River subdivision been completely fixed or repaired?

A Repeat that, please.

Q In terms of the condition of the trackage on the James River subdivision, as of February 19th, was there still work being done along the way?

A Yes, sir. Now, February the 19th, we put everything back to work from Clifton Forge to Tyree. We still didn't have it working from Tyree to Gladstone.

Q All right, sir; and you continued to do that?

A Yes, sir.

* * * *

APPENDIX B

Listing of Corporate Affiliations Prescribed by Rule 28.1 of the Rules of the Supreme Court of the United States

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Respondent the C & O states that it has merged into CSX Transportation, Inc. The parent of CSX Transportation, Inc. is CSX Corporation. CSX Transportation, Inc.'s subsidiaries, not wholly owned, and affiliates are as follows:

Akron and Harberton Belt Railroad Company (The)
Akron Union Passenger Depot Company (The)
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Philadelphia Railroad Company (The)
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Florida Pipeline Corporation
Central Railroad Company of South Carolina (The)
Central Transfer Railway & Storage Company
Centralia and Webster Springs Railroad Company
Chatham Terminal Company
Chicago and Western Indiana Railroad Company
Clearfield and Mahoning Railroad Company
Cleveland Terminal & Valley Railroad Company (The)
CSX Services, Inc.
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Delaware and Soundbrook Railroad Company
First Georgia Development Corporation
Fruit Growers Express Company
Home Avenue Railroad Company (The)
Lakefront Dock and Railroad Terminal Company (The)
Monogahela Railway Company (The)

Norfolk and Portsmouth Beltline Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company
RF&P Corporation
Terminal Railroad Association of St. Louis
Trailer Train Company
Winston-Salem Southboard Railway Company
Woodstock & Blocton Railway Company